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MEDICAL JURISPRUDENCE.

MEDICAL EVIDENCE.

Trials of John Davis;—of Donellen, for poisoning Sir Theodosius Broughton;—of Donnal;—of Cowper.

It is not a little surprising, that so intelligent and respectable a class of men as the medical profession should make so poor a figure in the witness-box. In our own experience, we have known so many gentlemen of this profession "break down," as it is called, that we have a great distrust of this kind of evidence. We have frequently seen a medical witness called into the box, and positively swear to a certain fact as the result of his experience, and then suffer himself to be completely driven out of his opinion. Take, for instance, the evidence of tests of poison: we have repeatedly heard a doctor declare that he had on analyzation discovered poison—arsenic, for example—in a particular vessel, or in the stomach of a deceased person, and, when asked his reason, he has stated that the existence of a particular fact, or a certain test, was an infallible proof of the presence of the poison; on cross-examination, this statement had been closely sifted, and he has been forced to admit that the appearance on which he relied is by no means infallible, and might have been produced by other substances: and that, in fact, although the life of the prisoner has been depending on his testimony, he has been guided by mere inference and supposition. We have seen this repeatedly happen: we have alluded to evidence of the presence of poison; we recollect one recent and remarkable instance on another point, which, as it has never been in print, we shall mention. At the autumn great sessions, John Davis was tried at Carmarthen for the murder of a young woman, who had been his sweatheart. The evidence was entirely circumstantial, and was of the faintest kind; a bloody hatchet had been found near the young woman, which was, to a certain extent brought home to the prisoner. This circumstance was the most important proof against him. A medical witness was called, and was asked, by the counsel for the prosecution, his opinion as to the instrument by which the young woman had been murdered. He answered, "that in his opinion it was either with a hatchet or a billhook." On cross-examination by the prisoner's counsel, the following questions were asked. Q. "You said that the wounds were inflicted with a hatchet or a billhook?" A. "Yes." Q. "You think they could have been committed with no other instrument whatever?" A. "*Yes.*" Q. "You are ready to swear that these were the only two instruments that could by possibility have been used?" A. "*I am ready to swear it.*" Q. "You think, then, that precisely the same effect would be produced by a hatchet and a billhook?" A. "*I do.*" Q. "The one having a concave, the other a convex edge?" A. "*I am of that opinion.*" Q. "These were the only two instruments that could have been used?" A. "*I think so.*" Q. "Now, sir, might not these wounds have been inflicted with a sword?" A. "*They could not.*" Q. "Why could they not?" A. "*Because the prisoner* HAD NO SWORD." Thus this person's evidence was given throughout on the presumption that the prisoner was actually guilty.

These observations have been suggested by reading a lecture delivered by Mr Amos at the London University, reported in the Medical Gazette. It will supply us with some further instances of the truth of our opinion on this subject; and we shall therefore, quote the most interesting part of it.

"A medical man who has not seen a patient, may, after hearing the evidence of others, be called to prove, on his oath, the general effect of the disease described by by them, and its probable consequences in the particular case. Thus, in prosecutions for murder, medical men have been allowed to state their opinions, whether the wounds described by witnesses were likely to be the cause of death; or, in another description of

cases, whether such and such appearances are symptoms of insanity? So a medical man may be asked his opinion upon many hypothetical points, not proved in evidence, but suggested by the ingenuity of counsel: as, for example, where the strangulation of a new-born infant is charged, whether the swollen and red appearance of the head might not have been occasioned by its being born some time before the body, or been produced by the accidental ligature of the navel-string.

"It is part of the business of a course of lectures upon Medical Jurisprudence, to inform the medical student when you are summoned upon a trial of this or that description, besides any *facts* which you may have witnessed, upon what points is the counsel on one or the other side likely to call for your *opinion?*

"You will say, it is easy enough to give an *opinion*. I may answer, that lawyers have the advantage of medical men in this—that the opinions of medical men are submitted to much more severe ordeal. Having given your *opinion*, you will be asked, what are the *grounds* of your opinion? If you say, *your own experience*, the extent of this will be narrowly investigated. If you say, from analogical experiments, which you have made upon the lower animals (as it is very frequent that horses and dogs, and cats, and other animals, are drowned or poisoned with a view to throw light on the manner of death of a person supposed to have been murdered,) you will be required to give satisfactory answer to the questions: for example, whether any certain analogy is to be drawn from the effects of any given species of poison upon an animal of the brute creation, to that which it may have upon a human subject; and whether particular substances, which would kill animals instantaneously, would have no noxious effect, or at least much less immediate effect upon the human subject?

"I will give some extracts of examinations, where analogy has been stated as the ground of medical opinion.

[Here the Professor read some passages from the direct and cross-examination of Dr Rattray—and then the following passage from the evidence of John Hunter on the memorable trial of Donellan.]

Mr John Hunter examined by Mr Newnham.

"'Q. Is any certain analogy to be drawn from the effects of any species of poison upon an animal of the brute-creation, to that which it may have upon a human subject? A. As far as my experience goes, which is not a very confined one, because I have poisoned some thousands of animals, they are very nearly the same. Opium, for instance, will poison a dog as well as a man; arsenic will have very nearly the same effect upon a dog as it would have, I take it for granted, upon a man; I know something of the effects of them, and I believe their operations will be nearly similar. Q. Are there not many things that kill animals almost instantaneously, that will have no detrimental or noxious effect upon a human subject; spirits, for instance, occur to me? A. I apprehend a great deal depends upon the mode of experiment. No man is fit to make one, but those who have made many and paid considerable attention to all the circumstances that relate to experiments. It is a common experiment, which I believe seldom fails, and it is in the mouth of every body, that a little brandy will kill a cat. I have made the experiment, and have killed several cats; but it is a false experiment. In all those cases where it kills the cat, it kills her by getting into her lungs, not into her stomach; because, if you convey the same quantity of brandy, or three times as much, into the stomach, in such a way as that the lungs shall not be affected, the cat will not die. Now, in those experiments that are made by forcing an animal to drink, there are two operations going on: one is a refusing the liquor, by the animal kicking and working with its throat to refuse it; the other is a forcing the liquor upon the animal; and there are very few operations of that kind but some of the liquor gets into the lungs. I have known it from experience. Q. If you had been called upon to dissect a body suspected to have died of poison, should you or not have thought it necessary to have pursued your search through the guts? A. *Certainly.* Q. Do you not apprehend that you would have been more likely to receive information from them than from any other part of the frame? A. *That is the track of the poison, and I should certainly have followed that track through.*'"

"Nay, more: you will not always be let

off with stating your *own opinion*, and giving some *ground* for it, but you will be expected to know something about the opinions of others; or at least you will appear very ignorant if you do not. And it may be observed, that perhaps lawyers, whose freedom of intellectual inquiry is fettered in the closest and most servile manner by authority, are apt to lay too great stress upon authority in medical matters. You must constantly, therefore, be expected to be taxed with such questions as these: What are Hunter's opinions upon such or such a subject? Was Haller, was Dr Mead, of the opinion you are now giving?

"I remember a medical man, at Lincoln, endeavoring to give the go-by to such questions, by slighting the information which was to be obtained from medical writers; answering, that 'the writers of books would advance anything.' Chief Justice Dallas severely reprimanded the witness, observing, that he would not sit in a court of justice and hear science reviled, and the recorded researches of the medical world represented by ignorant tongues as leading only to uncertainty.

"It has been a great reproach to the medical profession, that, on the occasion of celebrated trials, the medical witnesses on the one side and the other have contradicted each other in such a point-blank manner in their opinions delivered upon oath.

"Thus in the case of Donnal, tried at Exeter, in 1817, for poisoning his mother-in-law with arsenic, Dr Edwards, for the prosecution, is asked—What is your opinion, from the appearance of the deceased on dissection, as to the cause of her death? A. From the appearance of the stomach and intestines, independently of the examination and analysis of their contents, I have no doubt that the death was produced by arsenic. And, in re-examination, you have stated your opinion that the death was not occasioned by cholera morbus, and have been asked several questions upon the nature of cholera; do you change your opinion? A. I do not. When Dr Adam Neale is called for the defence, he is asked—Did you hear distinctly the description Dr Edwards gave of the appearance of the stomach after it was opened? To what should you, independently of other circumstances, have attributed that appearance? A. To no cause but disease. Q. What disease? A. Cholera morbus. In this he is followed by two or three more doctors. Dr Edwards spoke also as to the certainty of two tests he had employed—blue vitriol and lunar caustic; and that the circumstances of Mrs Donnal, having eaten onions shortly before her death, could not have affected the tests. The doctors for the defence denied the sufficiency of the tests, and deposed that the test would very probably be affected by the onions.

"So, in Donellen's trial, the doctors for the prosecution were particularly asked as to their opinion upon the symptoms described by Lady Boughton, and which I read on the last occasion; and they say that they are of opinion, from the symptoms described, that the cause of the death was laurel water. Q. Is the heaving of the stomach a circumstance which attends epilepsy, or apoplexy? A. It is not. Now, when John Hunter is called, he is asked—Are the symptoms that appeared after the medicine was given, such as necessarily to conclude that the person had taken poison? A. Certainly not. Q. If an apoplexy had come on, would not the symptoms have been nearly or somewhat similar? A. Very much of the same. Q. You have heard of the froth issuing from Sir Theodosius' mouth, a minute or two before he died; is that peculiar to a man dying of poison? A. No; I should rather suspect an apoplexy. Q. You recollect the circumstance that was mentioned of a violent heaving of the stomach? A. All that is the effect of a voluntary action being lost, and nothing going on but the involuntary.

"Again, the doctors for the prosecution swore that it was their opinion, from the *appearances of the body in dissection*, that Sir Theodosius had been poisoned; and that those appearances could not arise from putrefaction. John Hunter said, that in his judgment, the appearances were entirely the result of putrefaction, and that they did not afford the least suspicion that Sir Theodosius died of poison.

"But the most remarkable of a multitude of instances of cross-swearing by doctors, with regard to medical opinion, was in the case of Cowper, afterwards a Judge. He was tried for the murder of Mrs Stout, a Quaker lady, whose body was found in a river near Hertford, during the time Cowper

was attending the Hertford assizes as a counsel, and who had fallen in love with Cowper. She had also written some love-letters to another swain, signed "Your loving duck." The charge against Cowper was, that he had strangled the woman, and then had thrown her body into the river, in order to give a color to the charge of suicide. At the time this happened, Cowper's father and brother were sitting members for Hertford, after a recent election, which had had been strongly contested; and the irritation occasioned by it was still active. Accordingly, a long list of Tory doctors were summoned for the prosecution, and an equally long list of Whig doctors for the defence. The contest was upon a point of medical opinion with regard to bodies found *floating, without water in them*— how the deceased came by their death. Mrs Stout was found at the top of the water the day after she was missing; but her body was not opened till six weeks afterwards, when no water was found in it.

[The contradictions of the medical witnesses in this case were very remarkable indeed. We may refer the reader to them in Gordon Smith's Analysis of Med. Ev. pp. 274, 275, 281, 283.]

"I shall have occasion frequently, in the course of my lectures, to advert to the subject of the demeanor of medical witnesses. The hour will just allow of me, this evening, adverting to one piece of advice; which is, in the witness-box to drop as much as possible the language which is known only to scientific men, and to adopt that which is in popular use. If you have occasion to speak of a person fainting, do not say, as I have heard it said, that you found the patient in a state of *syncope*;—and you must not expect a court of justice to understand you if you talk of a person being *comatose*, or of the appearance of his stomach after death being *highly vascular*, or of your having discovered poisonous ingredients in his intestines by means of a *delicate* test. The Judge and counsel are generally very shallow men of science, and it is a great advantage for them to raise a laugh at persons whom they would represent to be using hard names for common things. Veterinary surgeons are a great game for counsel; as I remember, in particular, a veterinary surgeon, who, when cross-examined by Serjeant Vaughan, was so unfortunate as to make use of the term, "suspensary ligament," which the Serjeant interpreted "a hangman's noose." I should guard you also against the use of metaphorical expressions, of which I will give you an example.

"In the examination of Mr Tucker, in Donnal's case, the witness is asked—Have you seen the prescription which Mr Edwards wrote that night? No I have not; but I could wish to see it. (Here the prescription was shown to the witness.) Now, supposing a person to have retchings and purgings for several hours, and that you found these attended with frequent and fluttering pulse, in that state of the illness what should you have prescribed? A. *I should have prescribed diametrically opposite to the prescription of Dr Edwards; I should consider that prescribed by Dr Edwards as adding weight to a porter's back.* Mr Justice Abbott, (to the witness), 'Don't speak metaphorically: you are speaking just now of a gentleman of experience and respectability; I don't wish you to conceal your opinion, but only to speak it in a different language.'

"And considering that, when you are giving testimony in a witness-box, you are discharging a most responsible duty upon your oaths, I should recommend you, even if you should meet with rude and unbecoming treatment from an advocate, that you should not vie with him in a dexterous use of what my Lord Bolingbroke calls "the flowers of Billingsate." A short extract from a scene in the Oldham Inquest will illustrate my meaning.

"Mr Simmons, a surgeon of Manchester, in undergoing a cross examination by Mr Harmer. 'I think,' says Mr S., 'I am more capable of forming a correct opinion on the subject than Mr Cox.' 'The jury, Sir,' replies Mr H., 'will no doubt duly appreciate the value of that self-opinion.' *Mr Ashworth.* Really, Mr Coroner, I must interpose to protect the witness from this sort of attack. *Witness.* Oh! Mr Ashworth, let me go on, I will teach him surgery; I am anxious for a little more discussion; he is not the first lawyer I have taught surgery. *Mr Harmer.* Perhaps not; but notwithstanding the opinion you entertain of your own skill, I should be very sorry to be under your hands. *Witness.* Oh! I'll teach you surgery, sir. As you have challenged me with a castigation

from different medical opinions, I hope you will bring down Dr Cline, Sir Everard Home, and the other leading members of the faculty. I shall be very happy to see them. *Mr A.*—I will ask you, Mr Coroner, whether the witness is to be attacked in this kind of way. *Witness.*—I am sorry you should interrupt the gentleman, Mr Ashworth; I am anxious for a little more discussion with him. (Here much clamor ensued, and different gentlemen addressed the Coroner together.) *Witness.*—I want a little more discussion; don't interrupt the gentleman; I should like a little more discussion with him. *Mr H.*—I beg you will hear Mr Simmons; he says he wants a little more discussion. *The Coroner.*—I have exhausted all my patience, &c.'—Legal Obs.

AMERICAN CASES.

UNITED STATES CIRCUIT COURT.

PHILADELPHIA, NOVEMBER, 1839.

Darst and others v. Duncan.[1]

Construction of the act of Congress of May 19th, 1828, section 3.

State insolvent laws have no operation, *proprio vigore*, upon the process and proceedings of the courts of the United States.

The act of Congress of May 19, 1828, did not adopt the provisions of the Pennsylvania insolvent law, passed in 1820, and make them the law of the courts of the United States in Pennsylvania.

In an action against a sheriff for an escape of a prisoner committed on execution for debt, issued from the United States Circuit Court in 1832; it was held to be no defence, that the prisoner was discharged by virtue of the insolvent law of the state.

The plaintiff in this case having a judgment in this court against Jacob Roth, on which there was a balance due of $2000,43, took out a *capias ad satisfaciendum* against the defendant in the judgment, who resided in York county, Pa. He was arrested by the U. S. Marshal for that district, on the 6th of December, 1832, and committed to jail in York county, and on the day following was at large. Darst then brought this suit against the defendant, who was the Sheriff of York county, for an escape.

The justification set forth by the defendant's plea was, that Roth had been discharged from jail by the judges of the Court of Common Pleas of York county, upon his application and compliance with the Pennsylvania insolvent law.

And further, that by act of congress, approved May 19th, 1828, the said law of Pennsylvania was considered the law of the land so far as regards the several courts of the United States in the state of Pensylvania.

To this plea the plaintiff demurred, and the defendant joined in the demurrer.

T. C. Hamley, and *C. Wheeler* for the plaintiff.

A. C. Ramsey and *J. M. Read* for the defendant.

Hopkinson J.—If the matters set out in the defendant's plea can avail him to defeat the plaintiffs' action, it must be by virtue of some act of Congress of the United States. It is now settled so as no longer to be a subject of debate, that "State insolvent laws have no operation *proprio vigore*, upon the process and proceedings of the Courts of the United States." This is the language of Judge Story, delivering the opinion of the Supreme Court in the case of *Beers v. Haughton*, (9 Peters 359) and he there refers to various decisions of the same court, in which the same doctrine is declared, particularly to the leading cases of *Sturges v. Crowninshield*, (4 Wheat. 200) and *Ogden v. Saunders*, (12 Wheat. 213.) The opinion in *Ogden v. Saunders* is affirmed, and the principles there established are considered to be no longer open to controversy; the decrees of the court upon the effect of state insolvent laws are to be deemed final and conclusive. In the decision of *Beers v. Haughton*, the language of the court is particularly strong and explicit. "State laws," it is said, "cannot control the exercise of the powers of the National Government, or in any manner limit or affect the operation of the process or proceedings in the National Courts. The whole efficacy of such laws in the courts of the United States depends upon the enactments of Congress. So far as they are adopted by Congress, they are obligatory. Beyond this, they have no controlling influence." In referring to the cases of *Wayman*

[1] This case was formerly reported in the Law Reporter, vol. 2., page 246, upon a point raised subsequently to the decision now reported. In that report there was an error as to the date of the act of Congress, which will be readily corrected by a reference to the present opinion.

v. Southard, and the *Bank of the United States v. Halstead*, the court say, "It was then held, that this delegation of power by Congress was perfectly constitutional; that the power to alter and add to process and modes of proceeding in a suit, embraced the whole *progress of the suit* and every *transaction in it* from its commencement to its termination, and until the judgment should be satisfied, and that it authorized the courts to prescribe and regulate the conduct of the officers in the execution of final process, in giving effect to its judgment." It must be borne in mind hereafter, that this power is limited to proceedings *in the suit*, to transactions *in it*, and to the conduct of the *officers of the court, in the execution of the final process of the court* to give effect to the *judgment of the court*. It is added that this power of the Courts of the United States "enables the courts of the Union to make such improvements in its *forms and modes of proceeding* as experience may suggest, and especially to adopt such state laws on this subject, as might vary to advantage the forms and modes of proceeding which prevailed in September, 1789; "and further that the courts may, by their rules, not only alter the forms, but the effect and operation of the process, whether mesne or final, and the modes of proceeding under it." We must observe, as particularly affecting the case now before this court, the example given as explanatory of this doctrine, "so that it may read property not liable in 1789, by the state laws to be taken in execution, or may exempt property which was not then exempted, but has been exempted by subsequent laws." This is the language of the Supreme Court in an examination of the act of Congress, we have to consider. It is true the case in the Supreme Court turned upon the construction of a proviso in the act, which has no bearing upon our case, as this court has made no such rule as is mentioned in that proviso. My object in referring to the opinion in *Beers v. Haughton*, is to show, that no court of the United States, nor any State legislature, can exercise the power claimed over the process and proceedings of the courts of the United States, which is a power over the rights of the suitors in those courts, but by and under the authority of an act of Congress. The Supreme Court of Pennsylvania have unequivocally adopted the decisions of the courts of the United States, in relation to the effect of state insolvent laws, upon the process of the courts of the United States. In *Duncan v. Klinefelter*, (5 Watts 142,) the Supreme Court of this state say, "the provisions of the act of assembly [for the benefit of insolvents] relate only to debtors held under executions issued from the state courts. It has never been supposed that they intended to give to the state courts or judges power to control the process of the United States acting within the jurisdiction of the latter." It is equally clear, that the order of a state judge to discharge a debtor from imprisonment by virtue of an execution from a Court of the United States will afford no protection or defence for the sheriff or jailor who discharged him, if the judge in making the orders exceeded his jurisdiction. The object and design of the acts of Congress, for there have been several, to regulate the process of the courts of the United States have been to conform the process and the proceedings of their courts to the process and proceedings of the States, but beyond that, no act of Congress has pretended to go, either in giving power to their own court, or in adopting state laws and regulations. It was the intention of Congress that the process and mode of proceeding in the courts of the United States should be in harmony and uniformity with those of each particular state in which the courts of the United States were held. Thus, if in any state the defendant could not be arrested or held to bail on mesne process from a State Court, he would have the same privilege against process from the Court of the United States. If on final process of execution the person of the debtor could not be taken and imprisoned by the laws of the United States, he had the like exemption from final process issued from the courts of the United States; that is, if such exemption were given by state laws in force at the time of the passing of the law of Congress, which was presumed to embrace or adopt the state law, but not to be extended to regulations which might be subsequently made by state legislatures.

The question we have to decide results in the inquiry, whether the discharge of Jacob Roth from imprisonment by the order of an associate judge of York county, according to the provisions of an act of assembly, for the relief of insolvent debtors of Pennsylvania,

passed on the 28th day of March, 1820, was or was not authorized by the act of Congress of the 19th of May, 1828. If the act of Congress adopted the provisions of the act of assembly, and made them the law of the Courts of the United States, then the defendant was warranted in discharging Roth from his imprisonment, and the order of the judge will afford him protection and defence against the claim of the plaintiff in this suit. If on the other hand, the act of assembly has not been adopted and made the law of the courts of the United States in Pennsylvania, then the order of the state judge was an act beyond his jurisdiction, and will not avail the defendant against the claim of the plaintiff.

The section of the act of Congress of 1828, applicable to this case, is as follows: "That writs of execution and other final process, issued on judgments and decrees rendered in any of the courts of the United States, and the *proceedings thereupon* shall be the same except their style in each state respectively, as are now used in the courts of such state, saving to the courts of the United States, in those states in which there are not courts of Equity, with the ordinary equity jurisdiction, the power of prescribing the mode of executing their decrees in equity by rules of court" The plea of the defendant avers that by an act of assembly of the commonwealth of Pennsylvania, approved on the 28th day of March, 1820, a debtor held in execution in a civil suit, may apply when arrested in execution, to the president or any associate judge of the Court of Common Pleas of the county in which the suit was instituted, and give bond to the plaintiff, with sureties, to be approved by the judge, with the condition that the debtor shall appear at the next Court of Common Pleas for the said county, and take the benefit of the insolvent laws of the Commonwealth, &c. &c. Whereupon the said judge shall give an order to the sheriff, constable, or other person having said debtor in custody, to forthwith discharge him. The plea then avers, that by the third section of the act of Congress of the United States, of the 19th of May, 1828, the said act of assembly and the provisions aforesaid, became the law of the Court of the United States, in the state of Pennsylvania. It is then averred that Jacob Roth being arrested on execution, applied to a judge of the Court of Common Pleas of the county in which he was arrested, and having complied with the directions and provisions of the act of assembly, was discharged out of custody by the order of the judge.

Taking it, for the present, for granted that the application for the benefit of this law was properly made to the state judge, although the suit was not instituted in the county in which he was a judge, I will enquire whether the case of Jacob Roth is embraced by the act of Congress; in other words whether the defendant has maintained the allegation of his plea, that "the said act of assembly and the provisions aforesaid became the law of the courts of the United States in Pennsylvania."

The law of Congress enacts, that "writs of execution, and other final process issued on judgments and decrees rendered in any of the courts of the United States, and the *proceedings thereupon* shall be the same, except the style in each state respectively, as are now used in the courts of each state." The process here was a *capias ad satisfaciendum*. It was executed upon the person of the defendant, and he was committed to prison, as he might have been by the existing law of the state. In all these proceedings, the directions of the act of Congress were strictly complied with, and the execution was duly and legally served by the arrest and imprisonment of Jacob Roth. The whole defence in this case must depend upon the meaning and construction which shall be given to the words of the act of Congress, "and the proceedings thereupon," that is, the proceedings upon writs of execution or other final process issued, or judgment rendered in the courts of the United States. Was the application of Jacob Roth to the judge of York county for the benefit of the insolvent laws of Pennsylvania, a proceeding upon the writ of execution, under which he was imprisoned in the jail of the county of York? Was it a proceeding in any manner under the direction or control of the court which issued that writ of execution? Or had it any necessary or legal connexion with that execution so as to be legally, or properly speaking a "proceeding thereupon?" Was it not altogether a new proceeding under the authority and direction of another tribunal, for an object not only different from, but adverse to, the proceeding in

the Court of the United States, and the judgment then rendered, and the process issued for the satisfaction of that judgment? If indeed a state law had enacted, that no debtor should be arrested or imprisoned by any final process or execution upon a judgment obtained against him, the courts of the United States, in common with those of the state, would have been bound so to alter their final process and the "proceedings thereupon," which is their direction to their officer, that the person of the debtor should not be arrested or imprisoned under it, but the process in this case did rightfully and lawfully order the officer to take the debtor and commit him to prison; the writ was a lawful one, and the proceeding upon it by the officer was lawful; the command of the writ was fully obeyed, and the duty of the officer performed and fulfilled by committing the defendant to the jail of the county of York. When that was done, both the writ and the officer of the court had exhausted their power, and done all they had to do in obedience to the command of the court. The proceedings upon the judgment and execution are the proceedings of the plaintiff in the suit, and of the court by which the judgment was rendered, and are under their direction and control, and the plaintiff and the court were bound by the act of Congress to conform them to similar proceedings in the court of Pennsylvania. But after the writ of execution and the proceeding upon it had been thus executed, and the defendant was committed to prison by virtue of it, another proceeding was instituted by the action of the defendant for his own benefit, and commenced and pursued by his own will wholly independent of the plaintiff or the court, whose process had confined him, and being no proceeding by them, by their order, or for the execution or satisfaction of their judgment, how can it be said to be a proceeding upon that execution, by which must be understood a proceeding for the furtherance of the object of that execution; a proceeding to obtain the payment or satisfaction of the judgment for which the execution was issued? It is true, that the execution of this final process upon the person of Jacob Roth, was his inducement to apply to the judge of a state court for the benefit of a state insolvent law. It was the necessity which drove him to this relief, but it was, nevertheless, no proceeding upon the process, either legally speaking or in common parlance. In truth, when the application was made by Jacob Roth to the judge of York county, the *capias ad satisfaciendum* was *functus officii*; it had no longer any legal existence or vitality; it had fulfilled its duty; there was an end of it, and no future or further proceeding could be had upon it or by its virtue. When a defendant is taken on a *ca. sa.*, it is as to him considered in law a satisfaction of the debt. If the plaintiff consent to his discharge, even on a promise not afterwards performed, he cannot resort to his judgment again. So far was this doctrine once carried, that if a defendant taken on a *ca. sa.* died in prison, the plaintiff had no further remedy. By a statute, this injustice was redressed, and a plaintiff was allowed to have process against the goods of a debtor dying in prison. If a party taken on a *ca. sa.* escape or be rescued, he cannot be retaken on the same writ, but the plaintiff must sue out a new execution: so entirely is the first writ extinguished or defunct by the arrest and imprisonment of the defendant.

A reference to several decisions of the Supreme Court of the United States will, I think, fully support my construction of the act of Congress of 1828, in the use of the words *process* and *proceedings thereupon*. Some of these opinions, it is true, were antecedent to the passage of that act, but they relate to expressions in other acts of a similar import, and in some instances the same. In delivering the judgment of the court in *Wayman v. Southard*, (10 Wheat. 27—32) the chief justice is very particular in giving the construction of the phrases "modes of process," and the forms and modes of proceeding in suits, and says that "the last embraces the *whole progress of* the suit and every transaction *in it*, from the commencement to its termination." "It may then, and ought to be understood as prescribing the conduct of the officers in the execution of process, *that* being a part of the *proceedings in the suit*." Must we not conclude from this, that when the officer has executed the *final process*, the proceedings in the suit are ended. In *The United States Bank v. Halstead*, (10 Wheat. 60) Judge Thompson, speaking for the court, says: "The general policy of all the laws on the subject is very apparent. It was intended to adopt and conform to the

state *process and proceedings* as a general rule." And on page 61; "The power given to the courts over their process, is no more than authorizing them to regulate and direct the conduct of the *marshal* in the *execution of the process.* It relates, therefore, to the ministerial duty of the officer." Again at page 64; "An execution is the fruit *and end of the suit;* all the proceedings *on the execution,* are proceedings in the suit." "The court will enforce upon the officer a compliance with his duty, and a *due execution* of the process according to its command."

I have already referred to the case of *Beers v. Haughton*, for another purpose. At page 362 of 9 Peters, there is a passage in the same case which applies to the question I am now considering. The court are discussing the act of Congress of 1828, on the meaning of which, the decision of our case must depend; and giving their construction of the words "the proceedings on writs of execution and other final process." They say, "they must, from their purport, be construed to include all the rights, duties, and conduct of officers in the *service of the process,* according to its exigency, upon the person or property of the execution debtor." Thus far, this construction relates only to the rights and duties of the officer: in what follows, we see what is provided for the execution debtor; "And also all the exemptions from arrest and imprisonment under such process enacted by those laws." Can the defendant in this case contend that by the laws of Pennsylvania, Jacob Roth was exempted from arrest and imprisonment by the marshal under the process in his hands which he was commanded to execute? Did the marshal in the service of that writ violate any privilege or exemption to which Jacob Roth was entitled by the laws of the state? Certainly he had no such exemption or privilege. Certainly it was right and lawful for the officer of the Court of the United States to arrest and imprison him, and having done so, there was an end to his duty, to his responsibility, and to his power over the person of the debtor, or of the writ by virtue of which he was imprisoned. There is a manifest distinction between an exemption of the person of a debtor from arrest and imprisonment, and his liberation from confinement after he has been legally arrested and imprisoned. The first is a regulation of the process and proceeding of the court and its service, the other is a new power and proceeding for the relief of the debtor from the effects of the process by which he was imprisoned. But by an act of the Assembly of Pennsylvania, a debtor arrested and held in execution may apply to a judge of the court of the county in which the suit was instituted, and upon his complying with the requisitions of the act, the judge shall give an order to the sheriff to discharge him, and the sheriff shall be exonerated upon his making return of said order, or the process under which the said debtor was held in custody. It is difficult to apply the words or provisions of this act to process from a court of the United States executed by the marshal of that court, and to which he may have already made his return. But putting aside this difficulty, it is undeniable, and so treated in the defendant's plea, that unless this law of the state is extended to the Court of the United States by the act of Congress of May 1828, it cannot be applied to the process of those courts, nor afford any defence against the suit of the plaintiff here, and it is equally undeniable that the law of the state is not thus extended, unless it be so by force of the enactment in the act of Congress, that "writs of execution and other final process on judgments in the courts of the United States, and the *proceedings thereupon* shall be the same as are now used in the courts of the state." If, therefore, I have succeeded in showing that Roth's application to a state judge for the benefit of the state law cannot be considered as a proceeding upon the writ of execution which issued from this court, and was duly executed by the officer of this court, I have demonstrated that the discharge of Roth from his imprisonment by the defendant, was unauthorized, and of course that he must answer for it to the plaintiff in this suit. When we speak of a *proceeding upon a writ,* we intend something done in pursuance of it, under its command and authority. If we go farther than this, I know not where we shall find a limit. May we follow the imprisonment into all its consequences, and call them proceedings upon the writ of execution? The application of the debtor for the relief afforded by a law of Pennsylvania, was no part of the proceeding upon the final process of this court, nor had it any relation

to the duty of the officer of the court in executing that process. The manifest object and effect of the plea before us, and of the argument by which it has been supported is, that under a law of Congress to "regulate processes in the courts of the United States," we shall introduce by construction an insolvent law of Pennsylvania as obligatory upon the Court of the United States, which insolvent law has never been recognized or adopted by any act of Congress, unless it can be implied from the words in the act I have so often alluded to. Thus a suitor in a court of the United States is to be defeated in his right, and deprived of the remedy for the satisfaction of his judgment, to which by the laws of the United States he is entitled, by the action of another court and the operation of a state law which has "no operation *proprio vigore*, upon the process and proceedings of the courts of the United States," nor consequently upon the rights and remedies of the suitors in those courts.

Congress has not left the case of a debtor imprisoned under an execution unprovided for. A law of the United States has provided a means of relief for persons imprisoned for debt on process of execution from any court of the United States. What are we to do with this law with the construction now put upon the process act of 1828, which will entirely supply and supersede in practice the act of January, 1800, "for the relief of persons imprisoned for debt." One of the counsel for the defendant has argued that this law is repealed by the act of 1828. I see nothing to warrant this conclusion, and certainly the judges of the United States have continued to act under the law of 1800, without a suspicion that it was repealed. It may indeed be said that if we adopt the construction of the defendant of the act of 1828, the law of Congress for the relief of imprisoned debtors will seldom, if ever, be resorted to, if the debtor can obtain the more extensive relief of the state law.

It will be observed that this case differs from that of *Beers v. Haughton* in some important particulars.

1. The insolvent, Harris, was never arrested on the *ca. sa.*, issued against him at the suit of Beers, and of course was not imprisoned under that process. Before the commencement of the suit against Haughton, as the bail of Harris, Harris had been duly discharged from imprisonment from all his debts by the insolvent law of Ohio, and it was to the action thus brought on his recognizance, that he pleaded the discharge of Haines by that law. It was not a case in which the defendant had been duly arrested and imprisoned by the final process of the Circuit Court, and was released from imprisonment by a subsequent order of a state court under a state law.

2. The rule of the Circuit Court of the United States for the State of Ohio, has not been adopted here, nor any similar one ordered. Indeed, there is no occasion for any rule on the subject, inasmuch as the law of Pennsylvania was enacted long prior to the act of Congress, under which that rule was made to provide, I suppose, for state laws that might be afterwards enacted, but that existing state laws are to be judged by the act itself, which cannot be changed or affected by any rule of court. In our case, therefore, we must rest upon the enactments of the act of Congress of May 1828, and if that act did not authorize the release of Roth from his imprisonment, the defendant can obtain no protection from it. It is true the terms of the rule of court in Ohio are, that, "under neither mesne or final process shall any individual be *kept in prison*, (not shall be imprisoned) who, under the insolvent law of the state has, for such demand been released from imprisonment." This rule goes beyond the case of *Beers v. Haughton*, and if we had the same rule it would probably embrace the case before us. It greatly enlarges the privilege of the debtor as given to him by the act of Congress, according to my construction of it, which I have already explained, and will by a rule of court, give an effect to state laws enacted subsequent to the act of Congress, stronger than is given by the act to such laws then in existence.

It is not for me, at this time, to inquire whether the proviso in the act of Congress which gives a power to the Court of the United States so far to *alter their final process* as to conform to any change which may be adopted by the legislatures of the respective states for the state courts, was intended only to give to subsequent state laws the same effect in the form and execution of the process of the United States, as the act of Congress gave to the state laws then in existence, or whether it was intended to allow

the courts by their rules to enlarge the privilege given by the act, so as not only to conform their process to the process of the state, but to release a debtor who had been legally and duly imprisoned according to the commands of the process of the court, which process was in conformity with that of the state court. Such, it seems to me, would be the effect of a rule that no man should be *kept* in *prison* who had been discharged by a state insolvent law. This question would have arisen in the case of *Beers v. Haughton*, if Haines had been taken and imprisoned under the *ca. sa.* of the court of the United States, and had been afterwards released by a law of Ohio passed after the execution of that process. Such, however, was not that case, nor does the decision of the Supreme Court touch that question.

In my opinion, the judgment on this demurrer must be entered for the plaintiff.

SUPREME JUDICIAL COURT.

BOSTON, MARCH TERM, 1839.

Held by adjournment, January, 1840.

McGaw v. Ocean Insurance Company.

In general, when goods are shipped, a right to full freight attaches, and in case of detention or accident, the master may retain the cargo a reasonable time, and proceed on the voyage after the vessel is repaired.

In such a case, the ship owner is entitled to full freight upon all that part of the cargo which remains *in specie;* but upon what is entirely destroyed he is not entitled to freight.

Where there was an insurance upon freight from New Orleans to Havre, and the vessel was compelled to put back for repairs, and the master gave up to the shipper the cargo to be shipped in another vessel without demanding freight; it was held, that, under the circumstances of the case, the vessel might have been repaired within a reasonable time, and the underwriters were only liable for the freight upon that part of the cargo which was actually destroyed, and could not have been carried forward after the vessel was repaired.

THIS was an action on a policy of insurance on freight on board the ship Choctaw, from New Orleans to Havre, valued at $10,000. The vessel left New Orleans with a cargo of tobacco and cotton, and having struck on the bar at the mouth of the river, she returned to New Orleans, and her cargo was taken out in order to repair her. A portion of the tobacco was entirely destroyed, but the cotton was not injured. The vessel was immediately repaired and was ready for sea in about four months. Meanwhile the agent of the shippers of the cargo demanded of the captain that he should forward the cargo by another vessel or deliver it up. The master, who was a part owner of the Choctaw, finally delivered up the cargo without making any charge for freight.

The plaintiff, in the present action, sought to recover for a total loss.

C. P. and *B. R. Curtis* for the plaintiff.

Choate and *Crowninshield* for the defendant.

SHAW, C. J., in delivering the opinion of the court, said the first question to be considered was, whether the master was bound to deliver up the cargo to the agent of the shippers in New Orleans? In general, when goods are shipped, the right to full freight attaches. In case of detention or accident the shipper has no right to demand the goods without paying full freight.

If the vessel is damaged by the perils insured against and puts back, the master may retain the cargo and proceed on the voyage after the vessel is repaired. It is of no consequence, that the goods will get to the port of destination much later than was contemplated. This is no part of the ship-owner's care, as there is no stipulation as to the time when the goods shall arrive at the destined port.

If, then, the master gives up the goods when he is compelled to put back, he loses freight by his voluntary act. In all cases, if the goods, after a damage, remain *in specie*, the ship-owner may hold them and carry them to the port of destination, if there is reason to believe that the vessel can be repaired in a reasonable time.

In the present case, the court were of opinion, that when the vessel returned to New Orleans, there was a fair prospect that she could be repaired within a reasonable time, and the master had a right to retain all the cargo that remained, *in specie*, and carry it to the port of destination, for which he would have been entitled to freight.

The court did not mean to be understood, however, as intimating that the master in the

present case had acted injudiciously in regard to the owners, or had done wrong. Under all the circumstances of the case, he did well.

If he had re-shipped the cargo, his owners would have lost money, because freights were higher than when he took the cargo, and he would have had to pay more than he was to receive.

If he had retained the cargo until his ship was repaired, he could only have got freight on that part which was not destroyed; and as freights were rising he could reasonably expect to get higher freight when his vessel was ready.

Upon the whole, then, he did well to give up the cargo. But it follows, that if the voyage was given up when it might have been prosecuted, the underwriters were not responsible.

Upon the whole, the court were clearly of opinion that the plaintiff could not recover as for a total loss. But in regard to the goods which were totally destroyed, the plaintiff could have got no freight if the captain had taken the rest of the goods to the destined port, and for the freight of these the plaintiff must recover.

The result was, that for the freight of those goods which were not totally lost and might have been re-shipped, the underwriters were not liable. But for the freight of all the goods which were totally lost and could not have been re-shipped, they were liable.

Jackson and others v. Massachusetts Mutual Fire Ins. Co.

Construction of a policy of insurance.

A mortgagee has an insurable interest in the property mortgaged, entirely distinct from the mortgagor; and an insurance effected by both parties cannot be deemed in law a double insurance of the same property.

This was an action on two policies of insurance, dated April 1, 1829, by which the defendants insured Daniel Jackson and the heirs of Charles Jackson, deceased, in the sum of $3000 upon one tenement and $1200 upon another. The premises were destroyed by fire on the night of the 24th Sept. 1835. The amount of loss upon the property insured by the first policy was $2450 44, and by the second $1200. Daniel Jackson, the owner of one moiety of the premises insured, having deceased, the defendants paid his executors one half of the said amount of loss. The plaintiffs in the present action were the heirs of Charles Jackson and the owners of the other moiety; and this action was brought to recover the other half of the said amount of loss.

On the 12th of October, 1829, the plaintiffs mortgaged their moiety of the insured premises to Wm. Minot and L. Faulkner to secure the sum of $5000; and pursuant to the provision of said mortgage deed, the mortgagers procured as farther security several successive policies to be effected on the buildings insured by the defendants, by the National Insurance Co., of which no notice was given to the defendants, nor had they any knowledge of them until after the fire, by which the buildings were destroyed.

C. P. and *B. R. Curtis*, for the defendants contended:

1. That the policy was void, because by one of the rules of the company it was provided, that "when a subsequent insurance shall be made by any other company, or by any person, on property insured in this office, without the consent of the president in writing, and according to the terms in such consent expressed, it shall annul the new policy."

2. That the policy was not binding on the company because, by another rule, it was provided, that "when any mansion house or other building shall be *alienated* by sale, devise or otherwise, the policy shall thereupon be void, and may be surrendered to the company; but the grantee or alienee, having the policy legally transferred to him by the insured, his executors or administrators may, upon application to the Secretary, within thirty days, with the consent of the President, have the policy revived, and by such revival the person or persons causing the same, shall be entitled to all the rights and privileges to which the original insured was entitled under the said policy. When any estate, mortgaged, shall be taken possession of by the mortgagee, for a breach of the condition of the mortgage, the policy shall thereupon be void, unless it be transferred to

the mortgagee, with the consent of the President."

S. Hubbard and *Bartlett* for the defendants.

DEWEY J.—In regard to the first point, the court are of opinion, that the case comes within the principle laid down by the Supreme Court of New York, in the case of the *Traders Ins. Co. v. Robert*, (9 Wendell's Reports, 404,) where it was decided, that "where a policy of insurance is effected by a mortgagor and the policy, with the assent of the assurers, is assigned to the mortgagee, and a loss occurs, in an action on the policy by the mortgagee, in the name of the mortgagor, it is no bar to a recovery that subsequent to the assignment the mortgagor effected a second assurance, and neglected to give notice to the first assurers, although there be an express condition that the policy shall be void in case of second assurance and neglect of notice by the insured or his assigns."

In the present case, the subsequent policy was effected for parties having an entirely distinct interest from the persons assured by the first policy. Nor does it make any difference in the application of the principle, that the subsequent insurance was effected by the owners of the property who effected the first insurance, they having done it in accordance with the mortgage and for the benefit of the mortgagees.

Besides, if these policies were intended to cover and did cover the same identical interest, the latter policy, underwritten by the National Ins. Co., was void by a clause contained in it prohibiting double insurance, and of course the policies underwritten by the defendants were not affected by a subsequent assurance, which *was void and of no effect.*

In regard to the second ground of defence, the Court do not think that the clause referred to, in the policy, has been violated in any degree. It was contended at the argument that this mortgage of the property was an "alienation" within the meaning of the policy. But we cannot give such a construction to the term "alienate." The parties in using that term did not contemplate mortgages; and a conveyance by mortgage did not defeat the policy while the estate was in the mortgagor, and before the mortgagee had taken possession for condition broken. Undoubtedly, when the legal estate becomes vested in another person, the assured loses his interest in the policy.

Plymouth Cordage Co. v. Sprague and others.

Construction of an agreement for the sale of a ship.

The registry of a ship is only *prima facie* evidence of the ownership.

THIS was an action brought to recover for cordage furnished to a ship, alleged to belong to the defendants. William Eager, one of the defendants, was defaulted, and the action was defended by Sprague and James, who are shipwrights, of Medford.

In 1836, when Eager was in good standing as a merchant, he entered into a contract with Sprague and James for the purchase of the hull of a new ship, then lying at Lewis's wharf in Boston. The contract recited that Sprague and James agreed to *complete the hull*, and Eager was to pay fortyseven dollars per ton, and to pay the following bills, viz: "Spars; Blocks; Pumps; Dead eyes, &c.; all the block maker's bill; Boats; Iron for spars and rigging; Gold leaf and wheel for gear and stearing; also to assume and pay G. and H. Stearns's bill of five coils, of three inch rope, four coils of two and a half inch do.; two coils of ratlin; one ball of spunyarn; five oars for long boat and some other trifling articles of ship chandlery."

The contract concluded thus: "and one third of the ship when done to stand in the name of Sprague and James, as collateral security for the payment of the note."

The ship was registered at the custom house in the names of Sprague and James and Eager.

At the trial, the defendants contended that they were not responsible for the cordage furnished to the ship by the plaintiffs, who must look to Eager for their pay.

The jury, however, returned a verdict for the plaintiffs, and the defendants moved for a new trial.

Sprague and *Gray* for the plaintiffs.

Dexter and *Gardiner* for the defendants.

PUTNAM J.—The court are all of opinion that the verdict ought to be set aside. The construction which we put upon the contract

between Eager and Sprague and James is, that the legal title of the vessel was to vest in Eager, but that at some future time they were to have a lien on one third of the ship. At most their claim on the vessel could not be higher than a mortgage, and it is well settled that a mortgagee is not liable for supplies or repairs furnished for the mortgaged ship.

The fact that one third of the ship was registered in the name of Sprague and James is only *prima facie* evidence of their being owners, and may be rebutted by other evidence.

Verdict set aside.

SUPREME JUDICIAL COURT.

BANGOR, ME., JULY TERM, 1839.

Nathaniel Hatch v. Buchan Haskins.

Parol evidence will not be admitted to vary or explain the records of the registry of deeds.

When two mortgages of different dates are recorded simultaneously, the prior takes precedence.

If the holder of an equity of redemption, purchase the first mortgage, he does not thereby discharge his mortgage security.

A deed in the hands of the grantee, and produced by him, is presumed to have been delivered.

So a deed in the hands of the grantor, unexplained, is presumed not to have been delivered.

THIS was an action of ejectment to recover possession of certain mortgaged premises. Plea, *nil disseizin*. Date of the writ, Dec. 19, 1836.

The demandant in support of his claim, first produced an absolute deed of conveyance of the premises from Benjamin Bussey, to Elisha Brown, dated March 15, 1833; acknowledged and recorded, April 27, 1833;—a mortgage of said premises from said Brown to William A. Emmons, dated April 26, 1833; acknowledged April 27, 1833; recorded April 29, in the same year;—and an assignment on the back of said mortgage, from said Emmons to the demandant; dated May 2, 1833; acknowledged May 3, 1833; and recorded May 30, 1838.

Said mortgage was given to secure the payment of four notes of $69 60 each, which were produced by the demandant over due at the commencement of the suit and unpaid. The assignment to the demandant was for the consideration of two hundred and eighty dollars, as appeared in the assignment.

The tenant then produced a mortgage of the same premises from said E. Brown to Benjamin Bussey, dated March 15, 1833; acknowledged April 27, 1833; and recorded April 29, 1833;—a deed of quit claim of the premises from Bussey to the tenant and one Griffin, dated and acknowledged June 9, 1835, and recorded June 10, 1835;—also an assignment of said mortgage from Bussey to the tenant and Griffin, dated June 9, 1835. Not acknowledged or recorded.

This mortgage was also given to secure the payment of four notes of $69 60 each, which were produced by the tenant over due at the commencement of the suit, and unpaid. The assignment to the tenant was for the consideration of three hundred dollars and seven cents, as expressed in said assignment. The demandant then introduced a notice to the tenant's counsel, J. A. Poor, to produce a certain deed of mortgage from one Bradbury and said Griffin to said Brown, and on his refusal to comply with said notice, proved by his counsel, Mr Rowe, that upon a former trial of this action in compliance with a similar notice, the tenant's counsel produced a paper purporting to be such a deed of mortgage which was then put into the case by the demandant, and that upon the continuance of the case before said trial was concluded, Mr Poor took the paper into his possession again. Mr Poor then, at the request of the demandant, testified that he had such a paper in his possession and then in court, but would not produce and read it to the jury: whereupon the demandant moved, that the witness be ordered to produce and read the paper. This motion was not allowed. Mr Poor then testified that said paper was in the usual form of a mortgage deed, purporting to convey the premises in dispute to the said Brown, to be void upon condition that the mortgagers should pay the two sets of notes before described, given by said Brown, the one set to Bussey, and the other set to Emmons. That it was dated August 10, 1833, acknowledged on the same day and purported to be signed by said Bradbury and Griffin, and to have been signed, sealed, and delivered in presence of, and acknowledged before, Charles Stetson, Esq. That said Bradbury died intestate, January

29, 1834. That he was attorney of his administrator and first found this paper after the commencement of this suit among the papers of Bradbury's administrator in the office of McGaw, Allen and Poor, which papers were under his peculiar care, but accessible to his partners and students in the office. That previous to the sale of Bradbury's estate which was in June, 1835, he employed a student to examine into and make an abstract of the titles to Bradbury's estate, and that he never knew from him or from any other source of the existence of the mortgage from Brown to Emmons, till long after said sale.

The demandant then introduced a deed of warranty of the demanded premises, from Brown to Bradbury and Griffin, dated August 10, 1833; recorded and acknowledged, August 10, 1833, the consideration named of $652 50, and executed in presence of, and acknowledged before Charles Stetson, Esq.; an absolute deed of one half of the premises from Griffin to Bradbury, dated November 18, 1833; recorded July 11, 1835; and an absolute deed of the premises from one Page, administrator of Bradbury to the tenant, dated June 8, 1835; acknowledged June 9, 1835; and recorded June 10, 1835.

He then read the deposition of Oliver Porter, who testified that he was a clerk in the Registry of Deeds for the county of Penobscot in April, May and June, 1833, and that he made the memorandum which appears on the back of the mortgage from Brown to Emmons in his hand writing, and signed by him, and which certifies that the Emmons mortgage was recorded prior, on the same day, to the mortgage from Brown to Bussey. The memorandum was then read. The demandant also introduced a volume of the records shewing that the Emmons mortgage was recorded on an earlier page than the Bussey mortgage.

The tenant then proved by the Register of Deeds that all deeds are recorded in his office by their title in a small book, the day after they are received, and when recorded, are entered as of the day when left; that in April 1833, deeds were not actually recorded, till two or three weeks after they were received; that several volumes were in use at the same time, and that the entry on an earlier or later page, proved nothing as to the priority of receipt of either of two deeds, which were received on the same day: and by S. Lowder, the agent of Bussey, it was proved that Emmons had a bond of the premises from Lowder and made sale of the same on the bond to Brown; that the notes described in the Bussey mortgage were given to secure the payment of the purchase money to Bussey, and the notes described in the Emmons mortgage, were given for Emmons's profit in the sale, and that Emmons transacted the business, and knew all the facts at the time.

The case was submitted to the court upon the above stated evidence; and it was agreed that the court might infer from the evidence, any facts which a jury would be authorised to find.

Hatch, pro se, contended:

1. That the estate passed to Emmons by the second mortgage as the first mortgage had not then been recorded. That it was proved to have been recorded first and should take effect first. *State of Connecticut v. Bradish*, (14 Mass. 296;) *Trull v. Bigelow*, (16 Mass. 406.) That no time is prior for registry of a deed after its execution, but it takes effect the instant of its being recorded. *Sigourney v. Learned* (10 Rich. 72.)

2. That the tenant was not in as mortgagee, but as the holder of a legal estate. Powell on Mort. 252; *Thompson v. Chandler*, (7 Green. 377.)

3. That the tenant took the title subject to a mortgage from Bradbury and Griffin to Brown, and that this was a condition running with the land. That the mortgage, signed and acknowledged, must be presumed to have been delivered from the delivery of the deed of the same date from Brown to them, and that the two deeds should be taken together as one transaction.

J. A. and *H. V. Poor* for the tenant, contended:

1. That the title passed to Bussey by the first mortgage.

2. The recording of the mortgages were simultaneous, and in that event the first mortgage has priority of right and takes precedence.

3. That parol evidence was inadmissible to vary, contradict, or control the record.

4. That the demandant could gain nothing. That Emmons could not claim, as he had *notice* of the prior mortgage at the time of taking the assignment to him. A deed

recorded takes effect, and operates as notice to all parties taking subsequent conveyances, from the time of its registry. *Van Rensselaer v. Clark* (17 Wend. 25.)

5. That the demandant could gain nothing against the tenant's title, until the assignment to him was recorded. The principle contended for by the plaintiff, from 14 Mass. 396, applies with equal force in favor of the tenant who took his assignment, when for aught that the record shows, the second mortgage was held by Emmons, who acquired no title against Bussey's mortgage.

6. That though the tenant held the first mortgage and the equity of redemption, it was not a discharge of his mortgage. Courts will sustain a mortgage whenever it is for the interest of the mortgagee.

Hatch v. Kimball, (14 Maine Rep. 1;) *Thomson v. Chandler*, (7 Green. 377;) *Russell v. Austin*, (1 Paige, 192;) *James v. Morey*, (2 Cowen, 287.)

7. That the presumption of law was against giving any effect to the mortgage signed, but not proved to have been delivered, from Bradbury and Griffin to Brown.

Delivery of a deed is presumed, when found in the grantee's possession. So when found in the grantor's possession, by parity of reason, its non-delivery is equally a matter of legal presumption.

At the October Term, 1839, the opinion of the court was delivered by

SHEPLEY J.—It appears that Brown, who purchased of Bussey, re-conveyed to him on the same day in mortgage, and on a subsequent day made a second mortgage to Emmons. Both of these mortgages were recorded the same day, there being no indication of the hour of the day, and nothing upon record to show that one was received before the other, unless it can be inferred from the fact, that one appears to have been recorded on an earlier page of the book than the other. It is the date of the reception and record, and not the order in which the entry is made, that is to be relied upon as giving notice of priority. The record is the instrument of notice to subsequent purchasers of the state of the title, and to permit it in any manner to be effected by parol or extraneous evidence, would not only destroy its value for that purpose, but would convert it into an instrument of deception. It would be dangerous to the rights of all subsequent purchasers, and contrary to all established rules of evidence, to admit testimony offered to vary or explain the record; and it must all be regarded as out of the agreed statement of facts and the decision of this point in the case, must be made from the information to be derived from the record alone.

By the mortgage to Bussey the estate passed, and did not remain in the grantee until the deed was recorded. *Marshall v. Fisk*, (6 Mass. R. 31.) This title may be defeated by a subsequent conveyance first recorded; but to have this effect the record should be first, not simultaneous: the record of both mortgages must be regarded as made at the same time. So far as respects the record, their rights are equal, and the title which passed by the first deed is not defeated by an equality, but by a superiority of right in the second. A stranger to the title, wishing to purchase, and applying to the proper source of information, finds that the owner has made two conveyances to different persons, one before the other, and both recorded at the same time. How can he justly conclude that the title by the first conveyance has been defeated, when the second purchaser has not in any way acquired a superiority of right.

Judge Trowbridge says, "that if the last deed is recorded before the first, the title will pass to the second purchaser." (3 Mass. 581.) Mr Justice Jackson in delivering the opinion of the court, in the case *State of Conn. v. Bradish*, (14 Mass. 300.,) says, "but if the second purchaser proves his deed to be recorded before the other, and then sells the land *bona fide*, and for a valuable consideration to a person entirely ignorant of those circumstances, the latter will hold the land against the first purchaser." The demandant failing to show that the title by the first mortgage was defeated, can recover only by assuming the position of a second mortgagee, and showing that the debt secured by the first mortgage has been paid, or that the tenant holds it in such a manner that he cannot set it up against him.

The first mortgage cannot be regarded as paid or merged, for it is agreed that it was assigned to the tenant and Griffin, and that it was given to secure certain notes, "which were produced by the tenant overdue, at the commencement of this suit, and unpaid." The tenant derives his title by a conveyance

from Brown to Bradbury and Griffin, and from Griffin to Bradbury, and from the administrator of Bradbury to himself. The demandant contends that Bradbury and Griffin, on the day of their purchase from Brown, mortgaged the premises to him to secure the payment of the notes given by him to Bussey and to Emmons. Such a deed appears to have been signed, sealed, and acknowledged by them. The only testimony to prove it to have been delivered, and to have taken effect, as their deed is, that Mr Poor, who was the attorney for the administrator of Bradbury, "first found this paper after the commencement of this suit among the papers of Bradbury's administrator, in the office of Mc.Gaw, Allen, and Poor." It is said that the delivery must be inferred from the delivery of the deed from Brown to them, both being parts of the same transaction. If both deeds had taken effect, they should be construed together as designed to effect one object, but it may be that after the deeds were prepared and signed, another mode of securing or paying the consideration of the purchase was substituted, and that it was not intended that this deed should be delivered, or take effect; and the absence of all evidence that Brown had possession of it, or that it has been in the possession or controul of any one but one of the grantors or his legal representative, with the fact that it was found among the papers of that one after his death, raises a presumption that such must have been the fact. The possession and production of a deed by a grantee is *prima facie* evidence of its having been delivered, and for like reason in the absence of all contradictory testimony, the presumption arises that when found in the possession and produced by the grantor, it has not been delivered.

Upon the testimony in this case, although the fact may be otherwise, the mortgage cannot be considered as a valid deed. The tenant being in possession under a prior mortgage not paid, and so far as now appears, not being under any legal obligation to pay the mortgage held by the demandant, may resist his entry.

Plaintiff nonsuit.

Scott and others, in review, v. Blood.

Evidence of *common reputation* is not admissible, with other testimony, to prove a copartnership.

THIS was a writ of review brought by the original defendants in an action of assumpsit, in which they were declared against as copartners in business.

At the trial of the cause in review, the defendant, in addition to other evidence in the case to prove the copartnership of the plaintiff in review, offered evidence of *common reputation* of their copartnership in the neighborhood where they were doing business. This evidence the judge presiding at the trial rejected, and a verdict being rendered for the plaintiff in review, the defendant excepted.

The cause was argued before the full court at the June term, 1837, by *F. H. Allen* for the defendant, and by *E. Kent* for the plaintiffs, and was continued for advisement until the October term, when the exceptions were overruled, and judgment rendered on the verdict.

DIGEST OF ENGLISH CASES.

[Selections from 1 Per. & Dav. part 3; 7 Adolphus & Ellis, part 4; 8 Adolphus & Ellis, part 1.]

ARBITRATOR.

Choice of, by lot.—An election of an umpire by ballot is bad, *per se*, and can only be supported where the parties have consented. It is not sufficient proof of consent that the parties approved of the umpire, because they may suppose that he was chosen by the arbitrators. [*Ford v. Jones*, 3 B. & Ad. 248; *In the matter of Tunno*, 5 B. & Ad. 488; S. C. 2 N. & M. 328; *In the matter of Jamieson*, 4 A. & E. 945.]—*In re Greenwood v. Titterington*, 1 Per. & Dav. 461.

EVIDENCE.

Receipt by one partner not conclusive against the firm.—Where a receipt has been given by one partner in the name of the firm, but without the knowledge of the other partners, such receipt is not conclusive evidence against the firm in an action by them for their demand. A receipt in all cases is only *prima facie* evidence, which admits of an explanation, and evidence was therefore admis-

sable on the part of the partners to show that the receipt was fraudulently given by the other partner. [*Alner v. George*, 1 Camp. 392; *Scaife v. Jackson*, 3 B. & C. 421; S. C. 5 D. & R. 290;] *Farrar v. Huchinson*, 1 Per. & Dav. 437.

LEASE FROM YEAR TO YEAR.

Duration of.—Agreement to let "for one year from the date hereof, and so on from year to year until the tenancy hereby created shall be determined, as after mentioned," "at the yearly rent of 10*l.* a year, to be paid quarterly." "And it is further agreed between the said parties that it shall be lawful for the said A., or the said B., to determine the tenancy, by either of us giving unto the other three month's notice of either of their intentions." Notice to quit was given at the end of the first year:—*Held*, that as the agreement was for one year, and so on from year to year, it constituted a tenancy for two years certain, and therefore the notice to quit at the end of the first year was not sufficient. [*Birch v. Wright*, 1 T. R., 378.] *Doe d. Chadborn v. Green*, 1 Per. & Dav., 454.

LEASE OR AGREEMENT.

Construction of Deed.—A, being tenant in possession as a yearly tenant, entered into a memorandum of agreement with B., his landlord, in the middle of a current half year as follows: "B. agrees to let the farm of —— to A. for a term of fourteen years, determinable at the end of seven years, at the option of either party, upon giving twelve months' previous notice, at and for the yearly rent of 20*l*, payable half-yearly, without any deduction whatsoever. A lease to be drawn up in the usual terms, and the said A. agrees to take upon the said terms:—*Held*, that this was a lease, although the effect of it might be to cause a surrender of the previous term, and to merge the rent accruing due for the current half year. [Comyn's Dig. Estates G. 8; Co. Litt. 46 b.]—*Doe d. Philip v. Benjamin*, 1 Per. & Dav. 440.

MASTER AND SERVANT.

Valid cause for dismissal without notice.—A party was engaged as a clerk at an annual salary to conduct a business, and afterwards set up a claim to be a partner:—*Held*, that this was sufficient cause for dismissal without notice.—*Amor v. Fearon*, 1 Per. & Dav. 398.

NOTICE.

Fourteen days "at least."—Statute 4 & 5 *W.* 4. *c.* 76. *s.* 81.—Where an act is required by statute to be done so many days *at least*, before a given event, the time must be reckoned, excluding both the day of the act and that of the event. *Reg. v. Justices of Shropshire*, 8 A. & E. 173.

WITNESS.

Bill of Exchange.—Indorsee.—In assumpsit on a bill of exchange, by the indorsee against the acceptor, issue being joined on a plea of payment, a prior indorsee is a competent witness for the defendant, though he acknowledges, on the *voir dire*, that he received the money from the defendant to pay the plaintiff the bill.—*Reay v. Packwood*, 7 A. & E. 917.

OBITUARY NOTICE.

DIED in Roxbury, Mass., on the 11th of March, JOHN LOWELL, Esq., aged 70 years.

For the following sketch of the deceased, we are indebted to the editor of the New England Farmer.

Mr Lowell was born at Newburyport, and came to Boston early in life with his father, the first judge of the District Court appointed by Washington. He entered college at twelve, and became a practitioner at the bar before he was twentyone years of age. He came at once in competition with the eminent men of that period,—Dexter, Parsons, Ames, Gore, and Sullivan, composing an extraordinary galaxy of learning and talent and in spirit and activity, in legal learning and acquirement, in quickness of perception, in address, in fidelity to his client, and above all, in a character for integrity and honor, he held a rank at the bar second to none. Immersed in a flood of professional cares and labors, which were quite too much for his excitable and active temperament, his health became greatly impaired; and at the age of thirty five, when in general other men are just beginning to find their foothold in the

profession, he retired, and went to Europe for the restoration of his health. After an absence of three years, he returned to the country; and without resuming his professional business, he gave the energies of his enriched and active mind, his time, his services, and the powerful influence of his character to every object of a public nature, in which he saw an opportunity of serving the public welfare.

From the accession of Mr Jefferson to the Presidency to the close of Mr Madison's war, politics were the engrossing theme; and his contributions to the public [Federal] press were immense and incessant. They were always recognised. They were universally read. They were remarkable for their fulness of, and familiarity with, facts; for their boldness; for their extreme severity without any coarseness; and for the pungency and closeness with which he treated every subject which he discussed. With whatever severity he might write, no man was ever farther than he from making willingly any misstatement or exaggeration; and no one was ever more candid and just towards his adversaries. Few communications addressed to the public through newspapers or in a pamphlet form, probably ever had more influence upon public opinion than these. At one time Mr Lowell represented the town of Boston in the General Court; but excepting this, he neither sought nor would accept any public service, or any political trust of profit or honor whatever.

The finances of the town of Boston being at one time in some measure embarrassed and confused, he at once effectually exerted his influence to introduce system and arrangement, under which they were recovered; and the beneficial effects of which are felt to this time. The foundation of a general Hospital and a Hospital for the insane becoming then matter of interest, Mr Lowell may be said to have taken the lead in this humane project, and in laying the foundation of this distinguished monument of public liberality; and devoted his time, talents, money, and especially the powerful influences of his ardent mind and character to this object, with signal effect. The Institution for Savings, which has done more for humanity and good morals than almost any institution among us, and the Atheneum, among the brightest honors of our city, are largely indebted for their foundation and success to his intelligent and liberal exertion.

Mr Lowell, on account of declining health, had been for some time retired from general society; and has at last obtained his release from this scene of trial and labor in a way which a truly philosophic and good man would most desire—suddenly and without pain. He died while reading, in his chair. He has left a character which his children and friends will cherish as the richest legacy in this case that heaven could have bequeathed to them. Mr Lowell's mind was of the highest order, and remarkable for the quickness of its perceptions, the comprehensiveness of its views, and the soundness of its conclusions. His temperament was exceedingly excitable; and when engaged in any object of public interest, he kindled with enthusiasm, and his whole soul showed itself in his eyes, his words, and his actions. Other susceptible minds brought into contact, were at once brought into sympathy with him; and thus always rendered his society delightful. His conversation was always full to overflowing; and distinguished not more for the copiousness of its utterance than the fulness of his thoughts. His activity, promptness, and perseverance in whatever he undertook, were eminent traits of character; and he shunned no labor, wherever and whenever he had the power to do good. In his manners he was distinguished for his urbanity, his accessibleness, his simplicity, and perfect freedom from ostentation; and though from his talents and temperament he was always in the foreground in whatever society he mingled, yet it was evident no man ever thought less of himself as a leader. While he assumed for any object to which his mind and energies were devoted, all the importance which belonged to it, and to others it might be obvious that it was mainly effected by his personal exertions, yet no one ever assumed less for his own agency. Like the highest moral rank of minds, to which he belonged, he entirely lost sight of himself in view of any great object of social improvement, of usefulness and humanity. But what above all things was the crowning glory of his life, was his integrity; his clear and inflexible perceptions of moral right; his lofty and profound sense of duty; his honor, liberality, magnanimity and disinterestedness.

MONTHLY CHRONICLE.

MASSACHUSETTS.

Insolvents.—We continue our monthly list of insolvents. We are requested to correct an error which occurred in the list published in the January number, page 285. The name of *Charles* Richardson is there given as one of the firm of Richardson & Whitney. It should be *Joseph* Richardson.

Insolvents.	Place of Business.	Warrant's issued.
Andrews, Isaac C.	Boston,	March 24.
Bailey, Timothy W.	Springfield,	March 13.
Beaman, Ezra M.	Boston,	March 3.
Brown, Bartholomew,	Boston,	March 4.
Cummings, Robert,	Boston,	March 26.
Cutter, Nehemiah,	Graton,	Feb. 26.
Damon, Nathaniel L.	Boston,	March 13.
Dudley, David,	Boston,	March 27.
Fearing, Thomas B. (*Hatch & F.*	Boston,	March 17.
Fletcher, William, Jun.	Chelmsford,	March 21.
Goodwin, Daniel S.	Brighton,	March 2.
Hall, Charles G.	Roxbury,	Feb. 29.
Harding, Joshua,	Chatham,	March 12.
Hatch, Jabez, (*H. & Fearing*	Boston,	March 17.
Josselyn, Elijah,	Boston,	March 25.
Knapp, Isaac,	Boston,	March 16.
Morse, Jonathan 2d,	Lowell,	March 21.
Osgood, Isaac,	Bradford or Haverhill,	March 16.
Perkins, Freeman,	W. Springfield,	March 4.
Perkins, John G.	Boston,	March 17.
Plumer, Avery, Jr.	Boston,	Feb. 28.
Snow, James P.	Boston,	March 18.
Thomas, John B.	Boston,	March 5.
Williams, Lemuel,	Lowell,	March 7.
Woodbury, Thomas,	Charlestown,	March 6.

S. J. Court.—This court is actively engaged in hearing and determining the Suffolk and Nantucket cases. Several interesting decisions have been given, reports of which we are obliged to postpone till our next number.

TO OUR READERS.

The present number completes the second volume of the Law Reporter. This work has now been published two years, and the manner of its reception by the profession and by the public generally, has been, upon the whole, highly satisfactory to those immediately concerned in its preparation. Our subscription list, although not large, is constantly increasing; and it has been a source of much encouragement, that every number of the publication has been sent to more subscribers than the one immediately preceding. This constant accession to the number of our readers has been peculiarly gratifying.

We have from the first been assisted by numerous contributors, to whose exertions in our behalf we are deeply indebted. The work has contained many valuable reports which would otherwise have remained inaccessible to the profession for a long time; and some, which would probably never have been published. For two years the most important decisions of Mr Justice Story have been reported in this journal alone; and we have also been enabled to furnish our readers with the more interesting opinions of many other learned judges, in advance of the regular Reports. This fact alone is sufficient to account for the favorable reception of the Law Reporter; but the short reports of cases which gentlemen of the bar have prepared for the work, although not of so high authority as those first mentioned, have undoubtedly been of use as sort of indexes to the doctrines to be found stated at length in the volumes of Reports hereafter to be published.

In the several departments of this journal there have been deficiencies, which we have hitherto been unable to remedy to our own satisfaction. Our limits have been such as to render it necessary to omit many articles which we believe would have been useful and acceptable to our readers. We have also occasionally taken up considerable space in the discussion of questions of little interest to a large proportion of the profession. This was in some degree unavoidable. Living in a mercantile community and deriving our support in a great measure from those who are more particularly interested in mercantile law, it is necessary and proper that we should pay particular attention to decisions of that character. We believe, however, that in future no one will be disposed to complain of the lack of variety in the subjects treated of in the Law Reporter.

By an advertisement upon the cover of the present number, it will be seen that the publishers have determined to enlarge the work and to print it in a different and a better form in future. We trust we shall receive continued aid from our friends, and we hope to convince them at the end of another volume, that our wisdom has grown with our experience, and to find ourselves, that the popularity of our journal has increased with both.